NOOR AINI MAJID

v.

PENTEX SDN. BHD.

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[CIVIL SUIT NO. 22-63-1984]
24 FEBRUARY 1987

CIVIL PROCEDURE: *Interlocutory prohibitory injunction granted to plaintiff - Defendant applied to discharge - Conflict of evidence - To be decided at final hearing - Decision based only on undisputed facts - Specific performance of contract - Whether award of damages adequate - Serious questions to be tried - Whether question of seeking to delay.*

This was an application by the defendant for discharge of an *ex parte* interlocutory prohibitory injunction obtained by the plaintiff. The plaintiff had a licence to operate the canteen at the defendant's premises since 25 November 1985. The plaintiff's licence was terminated on 9 October 1986 as from 14 November 1985. The rival affidavits disclosed many areas of acute conflict of evidence which ought to be determined at the final hearing. Accordingly, the learned Judge decided on certain plain facts which were either undisputed or admitted.

Held:

[1] The plaintiff was, in substance, seeking specific performance of her contract to operate her canteen licence. Since the relationship between the parties had deteriorated the proper remedy if the plaintiff were to succeed would lie in an award of damages.

[2] Maintaining the interlocutory injunction would give rise to complex obligations and this would impose upon the Court the intolerable burden of continued superintendence. There is a consistent current of judicial opinion that in situations such at this Courts have refused injunctions.

[3] Also, by maintaining the injunction, the plaintiff would have been given the whole of the relief she was seeking in the suit before the final hearing since the licence would be determined by that period.

[Application allowed and costs to defendant.]

Cases referred to:

American Cyanamid Co. v. Ethicon Ltd. [1975] 1 All ER 504
Pickering v. Bishop of Ely [1843] 2 Y & CC 249; 63 ER 109
Johnson v. Shrewsbury and Birmingham Ry. Co. [1853] 3 De GM & G 914; 43 ER 358
Macqueen Lukey v. Mulholland [1931] 45 CLR 282
Miotli v. Belford [1961] 79 WN (NSW) 98
Scandinavian Trading Tanker v. Flora Petrolera Ecuatoriana [1983] 2 All ER 763
Lavery v. Pursell 188 Ch D 508
Frith v. Frith [1906] AC 254
Ryan v. Mutual Tontine Westminster Chambers Association [1893] 1 Ch 116
Atlas Steels (Aust) Pty. Ltd. v. Atlas Ltd. [1948] 49 SR (NSW) 157
Manchester Corporation v. Connally [1970] 1 Ch 420
Clerk v. Price 37 ER 270
Lumley v. Wagner [1843-60] All ER 386

For the plaintiff - Tan Beng Hong; M/s. Tan Beng Hong & Co.
For the defendant - Chan Hon Wai; M/s. Daud & Partners

JUDGMENT

Edgar Joseph Jr J:

This was an application by the defendant for discharge of an *ex parte* interlocutory prohibitory injunction restraining it, its servants or agents or otherwise from evicting the plaintiff or in any other way preventing her from carrying on her business as a canteen operator at the defendant's factory at Prai, Free Trade Zone, Province Wellesley, until after the trial of this action or until further order.

It was common ground that the plaintiff had submitted a tender in writing for a licence to operate a canteen at the licence factory aforesaid at a fee of RM100 p.m. In this she succeeded, her licence to operate the canteen taking effect from 25 November 85.

The plaintiff did in fact operate the canteen but then, on 9 October 1986, she received a letter from the defendant terminating her licence with effect from 14 November 1985 and requiring her to vacate the premises on the same day.

The rival affidavits disclosed many areas of acute conflict of evidence; for example, the plaintiff alleged that her licence was for a fixed term of three years, that she was required to and did pay a premium of RM3,000 in cash to the Pengurus Pentadbiran of the defendant company for which she got no receipt and, that although she ran the canteen satisfactorily without complaint, she was served with the notice of termination aforesaid and that too without being given an opportunity of being heard. On the other hand, the affidavit of the defendant's Administrative Manager (Encl. 25) was diametrically opposed to what the plaintiff had alleged; for example, he affirmed that the plaintiff's licence was for a duration of one year at a fee of RM100 p.m., no premium was demanded or received as alleged or at all, that the food, beverages and services rendered by the plaintiff were unsatisfactory in several respects, that her attention was drawn to this at a meeting held on 5 February 1986 and that her cashier had to be asked to leave the factory for insolent and improper conduct when dealing with the defendant's employees.

However, I did not think such conflicts of evidence ought to be disposed of on affidavit evidence; the proper place for their determination would be at the final hearing.

As Lord Diplock said in his speech in *American Cyanamid Co. v. Ethicon Ltd.* [1975] 1 All ER 504, 510 "It is no part of the Court's function at this stage of the litigation" - that is, in considering a motion for an interlocutory injunction, I interpolate - "to try to resolve conflicts of evidence on affidavit as to the facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature consideration".

Accordingly, what I propose to do is to base my decision on certain plain facts which were either undisputed or admitted.

It was manifestly clear that the relationship of the parties had soured to such an extent that the elements of mutual trust and confidence no longer existed. In this context, I did not place undue stress on the plaintiff's own admission that two of her workers were caught stealing from the licensee of the Chinese canteen at the defendant's factory.

Upon the above facts, it seemed clear to me that although the plaintiff sought to maintain the interlocutory injunction she was in substance, seeking specific performance of her contract to operate her canteen licence. The general undesirability from the view of public policy, to force individuals to maintain certain personal relationship, even though they have earlier freely

agreed to do so, has, for a long time, been recognised by the Courts (see, for example, *Pickering v. Bishop of Ely* [1843] 2 Y & CC 249; 63 ER 109, *Johnson v. Shrewsbury and Birmingham Ry. Co.* [1853] 3 De GM & G 914; 43 ER 358, *Macqueen Lukey v. Mulholland* [1931] 45 CLR 282 and *Miotti v. Belford* [1961] 79 WN (NSW) 98) and ordinarily the proper course is to confine the parties to their remedies at law.

In this context, Lord Diplock in *Scandinavian Trading Tanker v. Flora Petrolera Ecuatorian* [1983] 2 All ER 763, 766 saw no reason to distinguish between a contract of services and a contract for services (such as was the plaintiff's contract in the present case) for he said at p. 766 at *et seq:*

> A time charter, ... is a contract for services .... Being a contract for services it is thus the very prototype of a contract of which before the fusion of law and equity a Court would never grant specific performance: see *Clerk v. Price* 37 ER 270, *Lumley v. Wagner* [1843-60] All ER 368. In the event of failure to render the promised services, the party to whom they were to be rendered would left to pursue such remedies in damages for breach of contract as he might have in law ...
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> To grant an injunction restraining the shipowner from exercising his right of withdrawal of the vessel from the service of the charterer, though negative in form is pregnant with an affirmative order to the shipowner to perform the contract; juristically it is indistinguishable form a decree for specific performance of a contract to render services, even in the event of breach, this is contract which the English Courts have always disclaimed jurisdiction to grant ...

I have already mentioned that the relationship between the parties had deteriorated to such an extent that the elements of trusts and confidence no longer exists. I was therefore satisfied that the plaintiff's proper remedy, were she to succeed at the trial, would lie in an award of damages. In laying down the guidelines as to the approach of the Courts to interlocutory application *inter partes* for prohibitory injunctions, Lord Diplock in the *Cyanamid* case at p. 408 said:

> The Court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff claim appeared to be at that stage.

Accordingly, I did not consider it necessary to consider the balance of convenience but, had it been necessary to do so, I should have thought that the balance of convenience favoured the defendant rather than the plaintiff. It is true that the plaintiff claimed that she had invested much money in setting up the canteen but, on the other side of the scale, I could not look askance at the defendant's claim that there are stored in its factory valuable machinery and inflammable material, such as chemicals, so that if the plaintiff were allowed continued free access to its factory, there was a real apprehension on its part that the safety thereof would be at risk. This makes security at the factory a matter of the first importance.

The plaintiff's canteen is comprised in a room of one of the defendant's buildings within the precints of the factory. In these circumstances, it seemed to me that the defendant has justification for the apprehension aforesaid.

There were two further grounds for discharging the injunction and these may be stated shortly.

Clearly, had I maintained the interlocutory injunction, it would most probably have given rise to obligations so complex or unclear as to lead to application to Court for enforcement of its order to applications for amplification of its order with a view to defining further the obligations of the parties. This in turn may impose upon the Court the intolerable burden of continued superintendence. To illustrate and to emphasize this point, mention must be made of the fact that following the grant of the *ex parte* order the plaintiff took out two applications: one for leave to commit the Administrative Officer of the defendant company to prison for alleged infringement of the interlocutory injunction to wit, by preventing vehicles supplying goods to the plaintiff's canteen from entering the factory (Encl. 11) and another seeking amplification of the same by seeking to prohibit the defendant from engaging in four separate types of activity (Encl. 19).

There is a consistent current of judicial opinion that in situations such as this Courts have refused injunctions: see *Lavery v. Pursell 188 Ch D 508, Frith v. Frith* [1906] AC 254, *Ryan v. Mutual Tontine Westminster Chambers Association* [1893] 1 Ch 116 and *Atlas Steels (Aust) Pty. Ltd. v. Atlas Ltd.* [1948] 49 SR (NSW) 157. The individual Judges own intuitive sense of what is the appropriate course to take in the particular circumstances of each would probably be an important or even decisive factor.

The other further ground for my decision in this case, though I did not place undue stress on it, was this: had I maintained the interlocutory injunction, I would virtually have given the plaintiff the whole or the relief she was seeking in the suit, before the final hearing, for it was most probable, that by the time the action was heard and finally determined, the period of the licence, as contended for by the plaintiff, though disputed by the defendant, would have expired. This of course, was no bar to the interlocutory injunction being maintained if there was plainly no defence to the action and the only object in raising a defence was to obtain delay: *Manchester Corporation v. Connally* [1970] 1 Ch 420. In the present case, however I was wholly satisfied that the defence had raised serious questions to be tried and there was no question of its seeking to obtain delay.

In the result, I made an order in terms of the defendants Application by discharging the interlocutory injunction and directing an enquiry as to damages before the Senior Assistant Registrar. In consequence, the plaintiff's two applications aforesaid were dismissed. The defendant was, of course to have the costs of the proceedings in any event.

Also found at [1987] 1 CLJ 396